

# Cash Proffers in Virginia: Chesterfield Case Study

Presented by T. Preston Lloyd, Jr.  
Date September 17, 2014



## Policy of Infrastructure Finance

- > What is the relationship between (a) rezoning and (b) fiscal impact on the locality for capital improvements?
- > Traditional sources:
  - taxes,
  - assessments and
  - municipal bonds
- > Alternatives:
  - exactions (i.e. impact fees)
  - proffers
- > Limited by Dillon's Rule – the General Assembly puts the tools in the toolbox.

## Source of Proffers: Conditional Rezoning

"A nuisance may be merely a right thing in the wrong place -- like a pig in the parlor instead of the barnyard. "

J. Sutherland,  
Village of Euclid v. Ambler Realty Co.,  
 272 U.S. 365 (1926)



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## Requirements of Proffers

- > Landowner promises to do something to address an impact arising from the rezoning
- > Must be in *addition* to, not as *alternative* to, existing requirements or regulations
- > Must be voluntary
- > Must be reasonably related to the rezoning
- > Must be consistent with the comprehensive plan
- > Once accepted, become a part of the zoning ordinance and apply with equal effect (run with the land)
- > \*The project being funded by cash proffers must be part of a locality's capital improvement plan
- > \*The rezoning must directly give rise for the need of cash proffers

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## Rise of “Cash Proffers” in Virginia

- > 1973: General Assembly authorizes conditional zoning for counties with urban executive form of government (i.e. Fairfax County)
- > 1978: General Assembly grants the power of conditional zoning to the entire state, but does not allow localities to accept cash proffers (1973 localities not affected)
- > 1989: General Assembly authorizes conditional zoning with the acceptance of cash proffers, but only to those localities with a certain rate of population change (and those immediately adjacent to them)
- > 1989: Chesterfield County first locality in Richmond MSA to allow cash proffers
- > 1990: Chesterfield County adopts first Proffer Policy

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## Result of Issue Politics

- > Legislation allowing conditional zoning:
  - Originally proposed: local governments must obtain the permission of the rezoning applicant to be able to impose conditions (localities propose conditions)
  - Counter by development community: conditions must be voluntarily offered by the rezoning applicant (locality may only approve or deny)

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## Enter the Courts

- > *Board of Supervisors of Powhatan County v. Reed's Landing* (1995)
- > *National Association of Home Builders v. Board of Supervisors of Chesterfield County* (1996)
- > *Gregory et al. v. Board of Supervisors of Chesterfield County* (1999)
- > *Patrick v. McHale* (2000)
- > *Sowers v. Powhatan County et al.* (2008)

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## Case Study: Forest Ridge Project

- > Project: 22 acres off Courthouse Road in Chesterfield County
- > 2006: County approves conditional rezoning of the property for 48-unit residential subdivision with cash proffers
- > 2008: Property acquired by new developer (Viridis)
- > 2012: Viridis asked County to
  - Increase the density of Forest Ridge, and
  - Eliminate cash proffers as a condition to zoning case

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## Chesterfield County Proffer Policy

- > Maximum Cash Proffers: County calculates a potential maximum cash proffer payment based on the impact of a single dwelling unit on new road, school, public safety and recreation infrastructure (net cost per dwelling unit)
- > In-Kind Proffers: the County may accept land dedication or the developer's construction of some public facilities
  - If accepted, County may consider credit against the maximum cash payment
  - Credit is equal to the cost of the public facility construction

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## Chesterfield County Proffer Policy

- > Geographic Service Districts: the geographic area in which capital projects may be supported by cash proffers from a specific rezoning case
  - > Capital Facility Categories:
    - Schools
    - Parks
    - Roads
    - Parks\*
    - Libraries\*
    - Fire stations\*
- \*Cash proffers may be spent County-wide

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## Case Study: Forest Ridge Project

### > 2006: initial zoning case

- Imposed maximum cash proffers, BUT
- Received credit for cost of off-site storm drainage improvements to be constructed by the project owner

### > 2012: in exchange for request to increase density & eliminate proffers, Viridis offered:

- Fund construction of an off-site right hand turn lane on Courthouse Road (arterial highway)
- Amended plans for off-site storm drainage but still on the hook to fund construction

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## Case Study: Forest Ridge Project

### > Staff Recommendations:

- Approval of increase in density
- Acceptance of offer to construct turn lane
- Denial of request to eliminate the cash proffers
- Did not address consideration of credit for cost of in-kind proffers against maximum cash proffer amounts

### > Planning Commission:

- Approved Viridis' requests (including elimination of cash proffers)

### > Board of Supervisors:

- Denied the amendment due to refusal to pay maximum proffers.

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“Please be advised, I don’t want to see another case with waived [maximum] proffers come from my planning commission.”

- Board of Supervisors Chairman James M. “Jim” Holland  
Comment to Richmond Times-Dispatch, March 12, 2014

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### Claim #1: Violates 5<sup>th</sup> Amendment (Takings Clause)

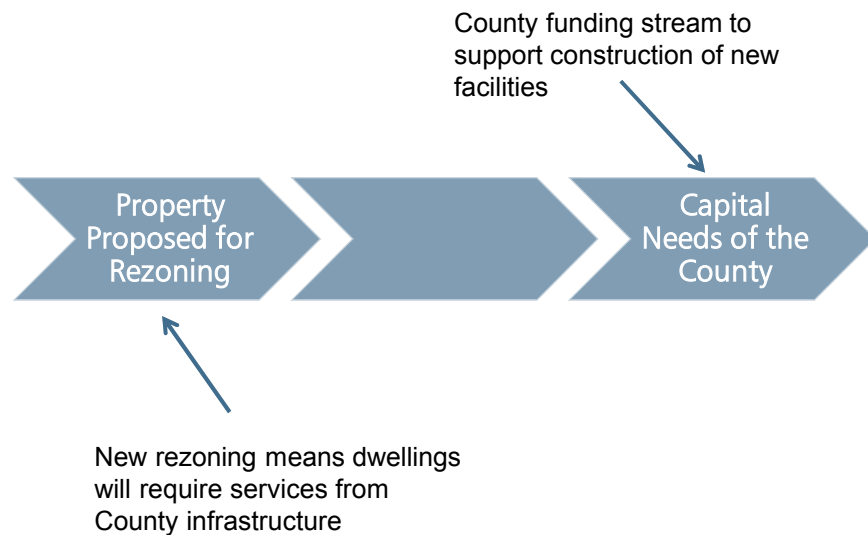
“Extortionate demands for property in the land use permitting context run afoul of the Takings Clause not because they take property but because they burden the right not to have property taken without being compensated for it.”

- *Koontz v. St. Johns River Water Management Dist.* (2013)

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## Essential Nexus / Rough Proportionality Test



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## Claim #2: Violates 14<sup>th</sup> Amendment (Equal Protection)

- > Prohibits the imposition of governmental land use restrictions where they intentionally treat similarly situated parties differently and where no rational basis exists for the difference in treatment
- > Comparison of land subject to rezoning to other recently rezoned property (similarly situated).

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### Claim #3: Denial is *Ultra Vires*

- > General Assembly has authorized Chesterfield to engage in conditional zoning, subject to limitations (15.2-2298):
  - Rezoning must give rise for the need for the conditions
  - Conditions shall have a reasonable relation to the rezoning
  - All such conditions shall be in conformity with the comprehensive plan
- > Chesterfield's Proffer Policy is utilized to calculate estimated infrastructure construction costs in multiple categories, which does not conform to these limitations

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### Claim #4: Violates Va. Equal Protection Clause

- > Va. Code 15.2-2282: "all zoning regulations shall be uniform for each class or kind of buildings or uses throughout each district...."
- > Proffers = equal force of zoning ordinance
- > By-right properties are not subject to cash proffer requirements

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## Basis for Relief

"[A]ny applicant aggrieved by the grant or denial by a locality of ... a conditional use permit ... where such grant included, or denial was based upon, an unconstitutional condition pursuant to the United States Constitution or the Constitution of Virginia, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs."

-Va. Code § 15.2-2208.1 (effective July 1, 2014)

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